97TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 97-580

INTELLIGENCE IDENTITIES PROTECTION ACT

MAY 20, 1982.—Ordered to be printed

Mr. BOLAND, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 4]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 4) to amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants, and sources, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendments numbered 6, 7, 10 and 12.

That the House recede from its disagreement to the amendments of the Senate numbered 1, 2, 3, 4, 8, 9, 11, 13, 14, 15, 16, 17, 18 and 19, and agree to the same.

Amendment numbered 5:

That the House recede from its disagreement to the amendment of the Senate number 5, and agree to the same with an amendment as follows:

In lieu of the matter stricken by said amendment insert:

REPORT

SEC. 603. (a) The President, after receiving information from the Director of Central Intelligence, shall submit to the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives an annual report on measures to protect the identities of covert agents, and on any other matter relevant to the protection of the identities of covert agents.

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(b) The report described in subsection (a) shall be exempt from any requirement for publication or disclosure. The first such report shall be submitted no later than February 1, 1983.

And the Senate agree to the same.

Amendment numbered 20:

That the House recede from its disagreement to the amendment of the Senate numbered 20, and agree to the same with an amendment as follows:

Restore the matter stricken by said amendment, amended to read as follows:

Sec. 601. Protection of identities of certain United States undercover intelligence officers, agents, informants, and sources.
Sec. 602. Defenses and exceptions.
Sec. 603. Report.
Sec. 604. Extraterritorial jurisdiction.
Sec. 605. Providing information to Congress.
Sec. 606. Definitions.

And the Senate agree to the same.

EDWARD P. BOLAND,
R. L. MAZZOLI,
WYCHE FOWLER,
LEE H. HAMILTON,
NORMAN Y. MINETA,
J. K. ROBINSON,
ROBERT MCCLORY,
Managers on the Part of the House.

STROM THURMOND,
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JOHN EAST,
JOE BIDEN,
PATRICK LEAHY,
JOHN H. CHAFEE,
DICK LUGAR,
HENRY M. JACKSON,
LLOYD BENTSEN,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE ON CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 4), to amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants, and sources, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The text of the bill resulting from the agreements of the committee on conference is as follows:

AN ACT To amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants, and sources

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Intelligence Identities Protection Act of 1982."

SEC. 2. (a) The National Security Act of 1947 is amended by adding at the end thereof the following new title:

TITLE VI—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

PROTECTION OF IDENTITIES OF CERTAIN UNITED STATES UNDERCOVER INTELLIGENCE OFFICERS, AGENTS, INFORMANTS, AND SOURCES

SEC. 601. (a) Whoever, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

(b) Whoever, as a result of having authorized access to classified information, learns the identity of a covert agent and intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $25,000 or imprisoned not more than five years, or both.

(c) Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that

such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

DEFENSES AND EXCEPTIONS

SEC. 602. (a) It is a defense to a prosecution under section 601 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.

(b)(1) Subject to paragraph (2), no person other than a person committing an offense under section 601 shall be subject to prosecution under such section by virtue of section 2 or 4 of title 18, United States Code, or shall be subject to prosecution for conspiracy to commit an offense under such section.

(2) Paragraph (1) shall not apply (A) in the case of a person who acted in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, or (B) in the case of a person who has authorized access to classified information.

(c) It shall not be an offense under section 601 to transmit information described in such section directly to the Select Committee on Intelligence of the Senate or the Permanent Select Committee on Intelligence of the House of Representatives.

(d) It shall not be an offense under section 601 for an individual to disclose information that solely identifies himself as a covert agent.

REPORT

SEC. 603. (a) The President, after receiving information from the Director of Central Intelligence, shall sumit to the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives an annual report on measures to protect the identities of covert agents, and on any other matter relevant to the protection of the identities of covert agents.

(b) The report described in subsection (a) shall be exempt from any requirement for publication or disclosure. The first such report shall be submitted no later than February 1, 1983.

EXTRA TERRITORIAL JURSIDICTION

SEC. 604. There is jurisdiction over an offense under section 601 committed outside the United States if the individual committing the offense is a citizen of the United States or an alien lawfully ad-

mitted to the United States for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act).

PROVIDING INFORMATION TO CONGRESS

SEC. 605. Nothing in this title may be construed as authority to withhold information from the Congress or from a committee of either House of Congress.

DEFINITIONS

SEC. 606. For the purpose of this title:

(1) The term "classified information" means information or material designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

(2) The term "authorized," when used with respect to access to classified information, means having authority, right, or permission pursuant to the provisions of a statute, Executive order, directive of the head of any department or agency engaged in foreign intelligence or counterintelligence activities, order of any United States court, or provisions of any Rule of the House of Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities.

(3) The term "disclose" means to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available.

(4) The term "covert agent" means—

(A) an officer or employee of an intelligence agency or a member of the Armed Forces assigned to duty with an intelligence agency—

(i) whose identity as such an officer, employee, or member is classified information, and

(ii) who is serving outside the United States or has within the last five years served outside the United States; or

(B) a United States citizen whose intelligence relationship to the United States is classified information, and—

(i) who resides and acts outside the United States as an agent of, or informant or source of operational assistance to, an intelligence agency, or

(ii) who is at the time of the disclosure acting as an agent of, or informant to, the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation; or

(C) an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified information and who is a present or former agent of, or a present or former informant or source of operational assistance to, an intelligence agency.

(5) The term "inteligence agency" means the Central Intelligence Agency, a foreign intelligence component of the Department of Defense, or the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation.

(6) The term "informant" means any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure.

(7) The terms "officer" and "employee" have the meanings given such terms by section 2104 and 2105, respectively, of title 5, United States Code.

(8) The term "Armed Forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(9) The term "United States," when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

(10) The term 'pattern of activities' requires a series of acts with a common purpose or objective.".

(b) The table of contents at the beginning of such Act is amended by adding at the end thereof the following:

"TITLE VI—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

Sec. 601. Protection of identities of certain United States undercover intelligence officers, agents, informants, and sources.

Sec. 602. Defenses and exceptions.

Sec. 6603. Report.

Sec. 604 Extraterritorial jurisdiction.

Sec. 605. Providing information to Congress.

Sec. 606. Definitions.

SECTION 601(c)

Although the Senate amendments to H.R. 4 did not affect the language of section 601(c) adopted by the House, the Committee of Conference believes it important and appropriate to discuss that section in this Joint Explanatory Statement because debate in both Houses centered upon its meaning.

BACKGROUND OF 601(c)

H.R. 4 as reported from the House Permanent Select Committee on Intelligence and S. 391 as reported from the Senate Committee on the Judiciary in 1981 both required that to be criminal the disclosure made by those with no access to classified information would have to be made "in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure."

H.R. 4 as passed in the House in 1981 and in the Senate in 1982, replaces this intent standard with a more objective standard which requires that the disclosure must be "in the course of a pattern of activities intended to identify and expose covert agents and with

reason to believe that such activities would impair or impede the foreign intelligence activities of the United States."

In adopting this amendment neither House intended to change the scope of the conduct which the Act seeks to proscribe. Rather, the change was made to deal with elements of proof at trial. The language as adopted makes it clear that the defendant must be engaged in a conscious plan to seek out undercover intelligence operatives and expose them with reason to believe such conduct would impair U.S. intelligence efforts.

The language of section 601(c) was considered by the House as a result of an amendment offered on the floor by Representative Ashbrook. The amendment was adopted by a vote of 226 to 181. The same language was considered by the Senate as a result of an amendment offered on the floor by Senators Chafee and Jackson. This amendment was adopted by a vote of 55 to 39. The bill containing the amended section 601(c) language was adopted by the House by a vote of 354 to 56 and by the Senate by a vote of 90 to 6. Thus, the following language appears in section 601(c):

> Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

The record indicates that the harm this bill seeks to prevent is most likely to result from disclosure of covert agents' identities in such a course designed, first, to make an effort at identifying covert agents and, second, to expose such agents publicly. The gratuitous listing of agents' names in certain publications goes far beyond information that might contribute to informed public debate on foreign policy or foreign intelligence activities. That effort to identify U.S. intelligence officers and agents in countries throughout the world and to expose their identities repeatedly, time and time again, serves no legitimate purpose. It does not alert to abuses; it does not further civil liberties; it does not enlighten public debate; and it does not contribute one iota to the goal of an educated and informed electorate. Instead, it reflects a total disregard for the consequences that may jeopardize the lives and safety of individuals and damage the ability of the United States to safeguard the national defense and conduct an effective foreign policy. The disclosure of covert agents' identities is detrimental to the successful and efficient conduct of foreign intelligence and counterintelligence activities of the United States. Whatever the motives of those engaged in such activity, the only result is the disruption of our legitimate intelligence collection programs—programs that bear the imprimatur of the Congress, the President, and the

American people. Such a result benefits no one but adversaries of the United States.

The standard adopted in section 601(c) applies criminal penalties only in very limited circumstances to deter those who make it their business to ferret out and publish the identities of agents. At the same time, it does not affect the First Amendment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs, or a private organization's enforcement of its internal rules.

Section 601(c) applies to any person who discloses the identity of a covert agent. As is required by sections 601 (a) and (b), the government must prove that the disclosure was intentional and that the relationship disclosed was classified. The government must also prove that the offender knew that the government was taking affirmative measures to conceal the classified intelligence relationship of the covert agent. As is also the case with sections 601 (a) and (b), the actual information disclosed does not have to be classified. However, the government must prove that the defendant knew that he was disclosing a classified relationship the government seeks to conceal by affirmative measures.

Unlike the previous two sections, authorized access to classified information is not a prerequisite to a conviction under section 601(c). An offender under this section has not voluntarily agreed to protect any government information nor is he necessarily in a position of trust. Therefore, section 601(c) establishes three elements of proof not found in section 601 (a) or (b). The United States must prove:

1. That the disclosure was made in the course of a pattern of activities, i.e., a series of acts having a common purpose or objective;

2. that the pattern of activities was intended to identify and expose covert agents; and

3. that there was reason to believe that such activities would impair or impede the foreign intelligence activities of the United States.

PATTERN OF ACTIVITIES

"Pattern of activities" is defined as a "series of acts with a common purpose or objective." It is important to note that the pattern of activities must be intended to identify and expose covert agents. The process of identifying such agents must involve a substantial effort to ferret out names which the government is seeking to keep secret. This pattern of activities must involve much more than merely restating that which is in the public domain. The process of uncovering names could include, for example, techniques such as: (1) seeking unauthorized access to classified information, (2) a comprehensive counterintelligence effort of engaging in physical surveillance, electronic surveillance abroad, and other techniques of espionage directed at covert agents, or (3) systematically collecting, collating and analyzing information from documentary sources for the purpose of identifying the names of agents. The process of exposing covert agents must involve the deliberate expo-

sure of information identifying them, the intentional "blowing" of intelligence identities.

It should, of course, be clear that "pattern of activities" does not necessarily mean a pattern of disclosures; a single, first disclosure of information identifying a covert agent is punishable under section 601(c) if the requisite pattern of activities and the other elements of the offense are proved beyond a reasonable doubt.

Most laws do not require intentional acts, but merely knowing ones. The difference between knowing and intentional acts was explained as follows in the Senate Judiciary Committee report on the Criminal Code Reform Act of 1980:

> As the National Commission's consultant on this subject put it, "it seems reasonable that the law should distinguish between a man who wills that a particular act or result take place and another who is merely willing that it should take place. The distinction is drawn between the main direction of a man's conduct and the (anticipated) side effects of his conduct."

A newspaper reporter, then, would rarely have engaged in a pattern of activities with the requisite intent "to identify and expose covert agents." Instead, such a result would ordinarily be "the (anticipated) side effect of his conduct."

Of course, the fact that a defendant claims one or more intents additional to the intent to identify and expose does not absolve him from guilt. It is only necessary that the prosecution prove the requisite intent to identify and expose covert agents.

This crucial distinction between the main direction of one's conduct and the side effects that one anticipates but allows to occur forms an important safeguard for civil liberties. Because the intent standard in section 601(c) is an intent "to identify and expose covert agents" rather than an intent to "impair or impede the foreign intelligence activities of the United States," it is clear that the fact that a journalist had written articles critical of the CIA which did not identify covert agents could not be used as evidence that the intent standard was met.

In order to fit within the definition of "pattern of activities," a discloser must be in the business, or have made it his practice, to ferret out and then expose undercover officers or agents where the reasonably foreseeable result would be to damage an intelligence agency's effectiveness. Those who republish previous disclosures and critics of U.S. intelligence would all stand beyond the reach of the law if they did not engage in a pattern of activities intended to identify and expose covert agents.

A journalist writing stories about the CIA would not be engaged in the requisite "pattern of activities," even if the stories he wrote included the names of one or more covert agents, unless the government proved that there was an intent to identify and expose agents. To meet the standard of the bill, a discloser must be engaged in a purposeful enterprise of revealing identities—he must, in short, be in the business of "naming names."

The following are illustrations of activities which would not be covered:

An effort by a newspaper intended to uncover CIA connections with it, including learning the names of its employees who worked for the CIA;

An effort by a university or a church to learn if any of its employees had worked for the CIA. (These are activities intended to enforce the internal rules of the organization and not identify and expose CIA agents.);

An investigation by a newspaper of possible CIA connections with the Watergate burglaries. (This would be an activity undertaken to learn about the connections with the burglaries and not to identify and expose CIA agents.); and

An investigation by a scholar or reporter of the Phoenix program in Vietnam. (This would be an activity intended to investigate a controversial program and not to reveal names.).

The government, of course, has the burden of demonstrating that the pattern of activities was engaged in with the requisite intent to identify and expose covert agents. The government's proof could be rebutted by demonstrating some alternative intent other than identification and exposure of covert agents.

For example, the reporters who have investigated the activities of Wilson and Terpil, former CIA employees who allegedly supplied explosives and terrorist training to Libya, would not be covered even if they revealed the identity of covert agents if their pattern of activities was intended to investigate illegal or controversial activities, and not to identify covert agents. Similarly, David Garrow would not be within the scope of the statute even though he purported to give the identity of covert agents in his book, "The FBI and Marin Luther King, Jr.: from 'Solo' to Memphis." His intent presumably was to explain what drove the FBI to wiretap Martin Luther King and not to identify and expose covert agents.

REASON TO BELIEVE

The government must also show that the discloser had reason to believe that the pattern of activities in which he was engaged would impair or impede the foreign intelligence activities of the United States. The "reason to believe" standard is met when the surrounding facts and circumstances would lead a reasonable person to believe that the pattern of activities would impair or impede the foreign intelligence activities of the United States. A government warning to a news reporter that a particular intended disclosure would impair or impede foreign intelligence activities could be considered by the jury, but the ultimate question for the jury would be whether the government had demonstrated that a reasonable person would believe that the pattern of activities in which he had engaged would impair or impede the foreign intelligence activities of the United States. Thus what would be relevant would be the objective facts about likely harm. Among the objective facts to be weighed by the jury in determining what a reasonable person would believe would certainly be the ease with which the name of a covert agent was identified and the extent to which it was widely and publicly known.

The conferees expect that the Department of Justice and the federal courts will limit the application of section 601(c) to those en-

gaged in the pernicious business of naming names as that conduct is described in the legislative history of this Act.

SECTION 603

The House bill contained section 603 which deals with procedures for establishing cover for intelligence officers and employees. This section required the President to establish procedures to ensure the protection of the identities of covert agents. Such procedures were to include provision for any federal department or agency designated by the President to assist in maintaining the secrecy of such identities.

The Senate struck section 603 by unanimous consent.

The conference report contains a substitute section 603 requiring an annual report from the President on measures to protect the identities of covert agents. The conferees expect such report to include an assessment of the adequacy of affirmative measures taken by the United States to conceal the identities of covert agents.

The conferees stress, however, as was made clear during consideration of this measure in both bodies, that nothing in this provision or any other provision of H.R. 4 or in any other statute or executive order affecting U.S. intelligence activities in any way diminishes the 20-year old Congressionally-sanctioned Executive Branch policy of maintaining the total separation of the Peace Corps from intelligence activities. The importance to the effectiveness of the Peace Corps of maintaining this policy and its essential components was spelled out in detail in the reports of the Senate Judiciary Committee and the House Permanent Select Committee on Intelligence and in the debate on this measure in both bodies, and the conferees wish to reemphasize this point and call attention to the strong views of both bodies as set forth in that legislative history.

SECTION 606(4)

Senate amendment 13 struck from the definition of "covert agent" certain former intelligence officers and certain other U.S. citizens who formerly were intelligence agents, informants, or sources of operational assistance. The conferees agreed to the Senate amendment.

In adopting the Senate amendment, the conferees note that the definition of "covert agent" and thus the scope of possible prosecution is closely tied to the concept of classified information. This connection is of utmost importance in insuring that, as it applies to those who are not undercover intelligence agency employees, the definition of covert agent does not include those private citizens who might provide information to the CIA or FBI, but whose public identification, though causing personal embarrassment, would not damage the national security.

It is to be noted that after House passage of H.R. 4 and Senate passage of S. 391, the President promulgated a new executive order on classification. The Committee of Conference understands that the changes contained therein, particularly the elimination of the concept of "identifiable" damage, the addition of the category of "confidential source," and the addition of a presumption of classifi-

cation for "intelligence sources and methods," were not intended to affect, and will not affect, a decision on whether an individual is or is not a "covert agent." The Committee of Conference expects the executive branch to exercise the utmost care in making classification decisions in this area.

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